U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLIS W. LONG, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Oklahoma City, OK

Docket No. 98-2466; Submitted on the Record;
Issued August 4, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization for surgery.

The Board has carefully reviewed the case record and finds that appellant has failed to meet his burden of proof in establishing that the proposed surgery was causally related to his work injury.

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[1] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[2]

While the Office is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure was incurred for treatment of the effects of an employment-related injury or condition.[3] Thus, to be entitled to reimbursement of medical expenses by the Office, appellant must establish a causal relationship between the

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[1] 5 U.S.C. § 8103(a).

[2] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[3] *Mamie L. Morgan*, 41 ECAB 661, 667 (1990); *see* 5 U.S.C. § 8103(a).

expenditure and the treatment by submitting rationalized medical evidence that supports such a connection and demonstrates that the treatment is necessary and reasonable.[4]

In this case, appellant, then a 45-year-old rural carrier, filed a notice of traumatic injury on December 11, 1989, claiming that on December 8, 1989 he injured his neck and arm when he lost control of his vehicle on a snowy road and hit a tree.[5] On January 4, 1990 the Office accepted the claim for a cervical strain and lumbar strain and subsequently included a depression.[6] Appellant was placed on the automatic rolls for temporary total disability by letter dated February 16, 1990.

Subsequently, appellant was examined by Dr. Eric S. Friedman, a neurosurgeon, who, in an October 28, 1997 report, recommended C5-6 and C6-7 anterior cervical microdiscectomy surgery with autologous iliac crest bone fusion based on appellant's magnetic resonance imaging (MRI) scan, which showed a "progression of a left-sided disc bulge, which now appears to be an extruded disc fragment" at C5-6 as well as "significant compression of the thecal sac and exiting left-sided nerve root at this level" and "a large disc-osteophyte complex" at the C6-7 level, "which also compresses the cal sac and exiting nerve roots." Dr. Friedman opined that it was possible that the surgery would "help increase his lower extremity strength so that a second procedure would not be needed."

The Office referred Dr. Friedman's reports and test results to an Office medical adviser, who opined on November 5, 1997 that the proposed anterior cervical discectomy and fusion surgery were unrelated to his December 8, 1989 employment injury and that appellant's current condition was "more likely due to normal aging than to an eight-year-old sprain."

Finding a conflict between the Office medical adviser's opinion and that of Dr. Friedman, the Office referred appellant to Dr. Joseph D. McGovern, a Board-certified orthopedic surgeon, along with a statement of accepted facts and a list of questions, for an impartial medical examination.[7] Dr. McGovern examined appellant on January 6, 1998 and reviewed the medical treatment records. In a report dated January 7, 1998, he opined that surgery was not warranted for appellant's lumbar or cervical strains. In support of this conclusion, Dr. McGovern referred to appellant's physical examination, diagnostic testing and the presence/absence of complications, clinical history and severity of appellant's condition and that cervical and lumbar strains usually heal within six weeks. Furthermore, on physical examination Dr. McGovern noted that appellant had normal heel and toe walks, "[f]orward bend was 70 degrees, backward bend was 25 degrees and side-wards 25 degrees. Sitting SLR was 70 degrees. In addition, Dr. McGovern stated that appellant's "cervical and lumbar stenosis is the result of aging and

[4] *Debra S. King*, 44 ECAB 203, 209 (1992).

[5] This was assigned claim number A16-167531.

[6] Appellant subsequently filed an emotional condition claim, which the Office assigned as claim number A16-190309. On June 28, 1991 the Office combined the two claims and accepted that appellant had major depression consequential to his accepted back injury.

[7] *See Shirley L. Steib*, 46 ECAB 309, 316 (1994) (noting that 5 U.S.C. § 8123 of the Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination).

many other factors. This was present in 1988 prior to the December 1989 car accident" and that surgery was not required for appellant's accepted employment injuries of cervical and lumbar strains. In addition, Dr. McGovern noted that "Dr. Friedman did not reveal any objective, physical findings and no long tract findings. With no objective findings, the need for objective support becomes more important" as the physician opined that "MRI findings can be misleading unless supported by history and physical examination."

On February 6, 1998 the Office denied authorization for the proposed surgery on the grounds that the medical evidence failed to establish a causal relationship between the procedure and the accepted work injury. The Office accorded determinative weight to Dr. McGovern's opinion as impartial medical examiner.[8]

In a February 10, 1998 report, Dr. Siavash Nael, an attending Board-certified psychiatrist, indicated that he had been treating appellant for depression and noted Dr. Friedman's request for authorization to proceed first with an anterior cervical microdiscectomy and autologous iliac bone fusion, which would see if that would help appellant with his lower spine problems. Dr. Nael stated the letter was written on appellant's "behalf to try to help him to come to some sort of closure" regarding whether the Office would authorize the surgery or not.

Appellant requested reconsideration by letter dated February 25, 1998 and argued that Dr. McGovern told him that Dr. Nael "was n[o]t qualified to make a decision regarding appellant's claim. Appellant also argued that Dr. McGovern was not qualified to evaluate whether surgery was needed as he was not a Board-certified neurologist.

By merit decision dated May 8, 1998, the Office denied appellant's request for modification on the basis that the evidence submitted was insufficient to warrant merit review.

The Board finds that the Office properly denied authorization for the proposed C5-6 and C6-7 anterior cervical microdiscectomy surgery with autologous iliac crest bone fusion.

In his January 6, 1998 report, Dr. McGovern concluded in a well-rationalized medical report that surgery was not necessary due to appellant's accepted cervical and lumbar strains. Furthermore, Dr. McGovern noted that appellant's lumbar and cervical stenosis were related to aging and other factors and that appellant's cervical and lumbar strain injuries did not require the surgery requested.

In his February 10, 1998 report, Dr. Nael indicated that he was treating appellant for depression and that the letter was written on appellant's behalf to help him get closure regarding whether or not the surgery should be authorized. Dr. Nael's opinion is insufficient to cause a conflict with Dr. McGovern's opinion as Dr. Nael provided no medical rationale explaining how the proposed surgery was related to the accepted employment injury or how it would provide relief. Furthermore, Dr. Nael noted that Dr. Friedman, appellant's attending physician, had

[8] The Office referred to Dr. McGovern as a second opinion, but this appears to be a typographical error as the record clearly indicates that Dr. McGovern had been selected by the Office due to the conflict between the Office medical adviser and appellant's physician regarding authorization for the requested surgery.

requested authorization for the surgery without providing an opinion specifically stating that the surgery was required.

On appeal appellant contends that the Office erred in choosing a physician specializing in orthopedics instead of a physician specializing in neurology. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.[9] The only limitation on this authority is that of reasonableness.[10] In the present case, there is no evidence that the Office acted unreasonably in selecting a Board-certified orthopedic surgeon instead of a Board-certified neurologist to determine whether the proposed surgery was necessary.

Inasmuch as the weight of the medical opinion evidence rests with the report of Dr. McGovern as impartial medical examiner, the Board finds that appellant has failed to meet his burden of proof in establishing that the proposed lumbar decompression was causally related to the accepted work injury.[11]

The decisions of the Office of Workers' Compensation Programs dated May 8 and February 6, 1998 are hereby affirmed

Dated, Washington, D.C.
August 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[9] *James C. Talbert*, 42 ECAB 974 (1991).

[10] *Raymond J. Hubenak*, 44 ECAB 395 (1993).

[11] *See Wiley Richey*, 49 ECAB __ (Docket No. 94-2367, issued November 7, 1997) (stating that where a case is referred to an impartial medical specialist to resolve a conflict in the medical opinion evidence, the opinion of the specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight).